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No. 91-712

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a person whom the government brings to this country for criminal prosecution by means other than those provided in an extradition treaty has a right not to be tried in this country's courts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 946 F.2d 1466. The opinion of the district court (Pet. App. 4a-41a) is reported at 745 F. Supp. 599.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1991. The petition for a writ of certiorari was filed on October 25, 1991, and granted on January 10, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

TREATY INVOLVED

The extradition treaty between the United States of America and the United Mexican States, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656, is reprinted at J.A. 72-87.

STATEMENT

1. *Respondent's Indictment and Apprehension*

In February 1985, Special Agent Enrique Camarena of the Drug Enforcement Administration (DEA) was kidnapped, tortured, and murdered in Mexico. A month later, the bodies of Agent Camarena and Alfredo Zavala-Avelar, a Mexican pilot working with Camarena, were found outside of Guadalajara, Mexico. Pet. App. 5a-7a.

Together with 18 others, respondent was subsequently indicted in the United States District Court for the Central District of California on charges growing out of the torture and murders of Camarena and Zavala-Avelar. J.A. 12-32.[1] The government anticipates that it would establish at trial that respondent, a medical doctor, used his medical skills to prolong Camarena's life so that others could continue interrogating and torturing him.

Respondent is a citizen and resident of Mexico. In 1989 and 1990, DEA officials attempted to bring respondent to this country through informal negotiations with representatives of the Mexican government. Those negotiations failed.[2] The DEA continued discussions, how-

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[1] Respondent was charged with committing violent acts in aid of racketeering and conspiring to do so, in violation of 18 U.S.C. 371 and 1959; kidnapping a federal agent and conspiring to do so, in violation of 18 U.S.C. 1201(c) and 1201(a)(5); and murdering a federal agent, in violation of 18 U.S.C. 1111.

[2] In December 1989, Jorje Castillo del Rey, a commandante in the Mexican Federal Judicial Police (MFJP), contacted a DEA informant to suggest a meeting regarding the possible exchange of a Mexican national implicated in Camarena's murder for a Mexican fugitive, Isaac Naredo Moreno, who was living in the United States.

ever, with Antonio Garate-Bustamante, a DEA informant who had served as an intermediary between the Mexican government and the DEA. DEA Agent Hector Berrellez instructed Garate to tell his contacts in Mexico that the DEA was willing to pay for information leading to the arrests of the persons responsible for Camarena's death. In March 1990, Garate informed Agent Berrellez that he had "associates" in Mexico who thought they could apprehend respondent and deliver him to the United States. Agent Berrellez instructed Garate to tell his associates that, in return for the delivery of respondent to the DEA's custody in the United States, the DEA would pay a $50,000 reward plus expenses. Pet. App. 7a-9a. Garate relayed that offer to his associates. *Id.* at 10a.

On the evening of April 2, 1990, five or six armed men apprehended respondent in his office in Guadalajara. Respondent was then driven to Leon, Mexico, and flown to El Paso, Texas. Respondent's plane landed in El Paso on April 3, 1990. DEA agents arrested him as he left the plane. As of May 25, 1991, the DEA had made a total of $20,000 in reward payments to the Mexican individuals who apprehended respondent. The DEA also

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On December 13, 1989, two DEA agents met with Castillo in Los Angeles, California. Castillo represented that he was working for the chief of the MFJP fugitive detail and that he was present with the knowledge and authority of the Mexican Attorney General. The meeting resulted in an understanding that respondent would be delivered to this country, and that the United States would investigate the immigration status of Moreno and would institute deportation proceedings if they were warranted. Pet. App. 7a-8a. The delivery of respondent was to occur after the Christmas holiday. The Mexican officials requested that the exchange be carried out "under the table" to avoid upsetting Mexican citizens. *Id.* at 8a. The arrangement fell apart, however, when the DEA refused to make a $50,000 advance payment required by Mexican officials to bring respondent to the border. *Ibid.* Although Castillo requested a second meeting in January 1990, the DEA cancelled the meeting because of concerns that it was a "set up" by the Mexican officials. *Id.* at 8a-9a.

brought to the United States seven of the persons involved in the apprehension as well as their families. For a time, the DEA paid the living expenses of those persons. Pet. App. 10a-11a.

On April 18, 1990, the Embassy of Mexico presented a diplomatic note to the United States Department of State requesting a report on possible American participation in respondent's abduction. J.A. 33. The note added that Mexico was conducting its own investigation of the case. *Ibid.* A month later, the Embassy of Mexico presented a second diplomatic note to the Department of State. That note stated that the Mexican government believed that respondent's abduction and transfer to the United States had been accomplished with the knowledge of persons working for the United States government, "in violation of the procedure established in the extradition treaty in force between the two countries." J.A. 35. The note demanded respondent's return. J.A. 36. Finally, on July 19, 1990, the Embassy of Mexico presented two diplomatic notes to the Department of State requesting the provisional arrest and extradition of Garate and Agent Berrellez because of their involvement in respondent's abduction. J.A. 39-45, 53-59.

2. The District Court's Opinion

Respondent filed a motion to dismiss the indictment based on the manner of his apprehension. Invoking the Due Process Clause of the Fifth Amendment, international law, and the extradition treaty between the United States and Mexico, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656, respondent argued that the district court lacked personal jurisdiction over him because agents of the United States had forcibly removed him from Mexico. Pet. App. 4a-5a.

The district court rejected respondent's due process claim, finding it foreclosed by *Ker* v. *Illinois*, 119 U.S. 436 (1886), and *Frisbie* v. *Collins*, 342 U.S. 519 (1952). The court explained that under the so-called *Ker-Frisbie* doctrine, the forcible abduction of a defendant from an-

other jurisdiction does not deprive a court of the power to try him on criminal charges. Pet. App. 13a-16a.[3]

The court found merit, however, in respondent's contention that his abduction violated the extradition treaty between the United States and Mexico. The court first determined that the *Ker-Frisbie* doctrine is inapplicable to a claimed violation of a treaty. Pet. App. 16a-18a. The court then held that the extradition treaty with Mexico bars agents of one country from seizing persons in the other country in order to prosecute them. The court thought it "axiomatic" that a party to an extradition treaty violates its treaty obligations when it unilaterally abducts a person from the territory of a treaty partner. *Id.* at 25a-28a. Finally, the court held that a person abducted in that fashion can obtain relief under the treaty if the offended country formally objects to the abduction. *Id.* at 18a-23a.[4]

In this case, the court found, "the DEA and its informants were integrally involved in [respondent's] abduction" and the United States was therefore chargeable with the acts of the abductors as its agents. Pet. App.

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[3] The court also rejected respondent's contention that the circumstances of his abduction fit within an exception to the *Ker-Frisbie* doctrine for cases in which the defendant demonstrates governmental misconduct of "the most shocking and outrageous kind." Pet. App. 15a, quoting *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 65-66 (2d Cir.), cert. denied, 421 U.S. 1001 (1975). The court found that respondent's allegations of mistreatment "are not worthy of belief" and that even if the allegations of mistreatment were true, the mistreatment would not rise to the level of shocking and outrageous misconduct. Pet. App. 16a.

[4] Because the court held that the extradition treaty was violated, it did not reach respondent's claim that he was entitled to relief because his apprehension violated the Charter of the United Nations and the Charter of the Organization of American States. Pet. App. 37a. The court noted, however, that "the weight of authority indicates that these international instruments are not self-executing and therefore are not enforceable in federal courts absent implementing legislation." *Id.* at 38a.

24a-25a. Because Mexico filed a formal protest, the court held that the abduction violated the extradition treaty and gave respondent standing to raise the violation in his criminal case. As a remedy for the violation, the court ordered the United States to return respondent to Mexico. *Id.* at 36a-37a. The court viewed that action as necessary to effectuate the principle of international law that a State must go "as far as possible" to make reparation for a violation of an international obligation and must "wipe out all the consequences of the illegal act." *Id.* at 36a, quoting 2 *Restatement (Third) of the Foreign Relations Law of the United States* § 901, at 343, Reporter's Note 3 (1987). The district court refused, however, to dismiss the indictment.

3. *The Ruling in United States v. Verdugo-Urquidez*

The United States appealed. While the appeal was pending, the court of appeals issued its opinion in *United States* v. *Verdugo-Urquidez*, 939 F.2d 1341 (1991), petition for cert. pending, No. 91-670. Verdugo had been convicted on charges growing out of the torture and murder of Agent Camarena. Like respondent, Verdugo contended that he had a right not to be tried in this country's courts based on the manner of his removal from Mexico. The court of appeals accepted that claim.

The court of appeals first held that Verdugo's claims were not barred by the *Ker-Frisbie* doctrine. The court stated that the *Ker-Frisbie* doctrine does not apply when the government sponsors an abduction from a foreign country, arguably in violation of an extradition treaty, and the foreign government objects to the abduction. 939 F.2d at 1345-1349.

Next, the court of appeals declared that the extradition treaty between the United States and Mexico implicitly bars the United States from abducting a person from Mexico in order to prosecute him in the United States. Although not relying on any express treaty pro-

vision, the court said that it would "make[] no sense" to construe an extradition treaty not to proscribe an individual's abduction from a foreign State without that State's consent. 939 F.2d at 1351. The court rejected the government's argument that a court may not imply such a term in an extradition treaty, and it gave no weight to the Executive Branch's view that the treaty between the United States and Mexico contains no such implicit term. *Id.* at 1348, 1353-1355.

The court of appeals further held that if the foreign country objects to the abduction, the defendant has derivative standing to claim that the extradition treaty was violated. 939 F.2d at 1355-1357. The court dismissed the contention that such a claim implicates political questions that are unsuited for judicial resolution. *Id.* at 1357-1358.

Finally, the court ruled that the appropriate remedy for a treaty violation is to repatriate the improperly seized individual to the country from which he was taken. The court explained that such a remedy is required "[i]n order to restore the offended nation to the position in which it would have been had the United States complied with the treaty." 939 F.2d at 1360.[5]

4. The Court of Appeals' Decision In This Case

Based on the legal rulings announced in *Verdugo*, the court of appeals affirmed the district court's order requiring respondent's repatriation. Pet. App. 2a. The court observed that the government did not dispute on appeal that respondent was abducted by paid agents of the DEA and that the abduction was accomplished at the DEA's behest. Thus, the court noted, it was not necessary to order a remand to determine whether the United States had authorized or sponsored the defendant's abduction,

[5] Because the district court in *Verdugo* had made no finding that the United States authorized or sponsored Verdugo's abduction from Mexico, the court of appeals remanded the case for proceedings to consider that issue. 939 F.2d at 1360.

because "the requisite findings" about the government's actions had already been made. *Ibid.* The court also noted that the Mexican government had "unequivocally" claimed that respondent's abduction violated the extradition treaty between the United States and Mexico, and that the Mexican government has "at all times" insisted that respondent be repatriated.[6] Accordingly, the court found, "there remains no question about the adequacy of Mexico's protest in this case or about Mexico's demand for repatriation." *Id.* at 3a. The court therefore affirmed the district court's order requiring respondent's repatriation to Mexico. *Ibid.*[7]

SUMMARY OF ARGUMENT

A.1. For more than a century, this Court has held that a court's authority to try a defendant for crimes is not impaired by the fact that the defendant was abducted from another jurisdiction. The *Ker-Frisbie* doctrine, as that proposition is called, is directly applicable in this case. It reflects the judgment, expressed in a wide variety of settings, that foreclosing prosecution is too high a price for society to pay for an unlawful arrest.

2. The court of appeals erred in concluding that this case fits into an exception to the *Ker-Frisbie* doctrine. The *Ker-Frisbie* doctrine is inapplicable when the government obtains custody of a defendant under an extradi-

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[6] On November 9, 1990, Mexico's Consul General in Los Angeles sent a letter directly to the court of appeals reiterating Mexico's view that the seizure of respondent violated the extradition treaty and that respondent should be returned to Mexico. J.A. 8, 67-71.

[7] The court of appeals also stated that *Verdugo* required dismissal of the indictment. Pet. App. 3a. That statement was incorrect. *Verdugo* did not hold that an indictment must be dismissed as a remedy for the sort of treaty violation asserted in this case. Moreover, that statement in the court of appeals' opinion was inconsistent with the court's own judgment in the case. The district court had expressly refused to dismiss the indictment, *id.* at 40a, and the court of appeals affirmed the district court's judgment in all respects. *Id.* at 3a.

tion treaty, since the treaty may give rise to rights in favor of persons brought to this country pursuant to the treaty. More generally, the doctrine is inapplicable when a treaty provides that a violation of the treaty will restrict the jurisdiction of the offending nation's courts. Neither case is presented here, however. Respondent was not apprehended under our extradition treaty with Mexico, and that treaty contains no provision barring the exercise of criminal jurisdiction when custody of the defendant is obtained by an extraterritorial arrest.

B. The court of appeals sought to circumvent the *Ker-Frisbie* doctrine by holding that respondent's abduction violated the extradition treaty between this country and Mexico. The extradition treaty, however, does not address such extraterritorial arrests.

1. The court of appeals, while recognizing that the extradition treaty does not expressly address extraterritorial arrests, nevertheless reached the unprecedented conclusion that respondent's abduction violated an implied obligation arising under the treaty. In fact, however, the government's conduct in this case violated no provision of that treaty, express or implied.

Our extradition treaty with Mexico, like extradition treaties generally, does not regulate apprehensions that are conducted outside the extradition context. Extradition treaties establish rules and procedures that govern the process by which one State assists another in obtaining custody of a fugitive. Our treaty with Mexico serves that limited objective. No provision in its text, and nothing in its history, suggests that it regulates apprehensions made without invoking the treaty's terms. The treaty is not a general compact for the protection of territorial rights, and courts are not empowered to rewrite the Nation's treaties to suit their notions of proper international behavior.

2. The *Ker-Frisbie* principle is a familiar feature of our law with respect to international relations, and it has informed our diplomatic and legal relations with

Mexico over the years. It would fly in the face of that history to suggest that our extradition treaty with Mexico silently overruled the *Ker-Frisbie* principle and rendered extraterritorial arrests a violation of an implied obligation under the treaty. The United States is party to more than 100 extradition treaties, none of which has ever been read to restrict the ability of the United States to act unilaterally in apprehending fugitives abroad.

3. International compacts such as the United Nations Charter and the Charter of the Organization of American States provide no support for the court of appeals' rule in this case. Because those compacts explicitly address issues of territorial integrity, it would be surprising if the same issues were addressed in extradition treaties by implication. Moreover, those compacts have never been thought to be enforceable in a United States court. It would be anomalous to hold that extradition treaties, which do not even address the issue of extraterritorial arrests, nevertheless create by implication enforceable rights that can be raised by a criminal defendant in a domestic trial.

C. Even if the extradition treaty contains an implied obligation that was violated in this case, a criminal defendant has no standing to raise that claim, whether or not Mexico protests the defendant's apprehension.

1. There is nothing in the treaty to suggest that a person in respondent's position may assert, in court, Mexico's objection to his apprehension. Ordinarily, treaties are enforced by the sovereign nations that are party to them; private individuals have no enforceable rights under the treaties absent a clear provision to the contrary. The extradition treaty in this case creates no such mechanism for private enforcement.

2. To recognize a private right to raise an implied treaty provision barring extraterritorial arrests would violate the principles underlying the political question doctrine. Courts have properly been cautious about creat-

ing individually enforceable rights in areas such as foreign relations that are far from the courts' ordinary sphere of competence. Courts are not well suited to interpret diplomatic notes, assess the status of this country's relationship with other nations, and balance this country's interest in maintaining good relations with foreign powers against the need to enforce our criminal laws. For a court to take on those functions, without any express mandate in a treaty or statute, would invade the province of the Executive Branch to direct this country's international affairs.

Accordingly, the extradition treaty with Mexico should not be interpreted to grant to respondent, by implication, an enforceable right to be repatriated to Mexico because of the manner of his apprehension. The court of appeals should have applied the *Ker-Frisbie* rule and required respondent to stand trial on the charges against him.

ARGUMENT

THE COURT OF APPEALS ERRED IN ORDERING THE UNITED STATES TO REPATRIATE RESPONDENT TO MEXICO

A. The *Ker-Frisbie* Doctrine Bars A Court From Ordering A Defendant's Repatriation Based On The Manner Of His Apprehension

This Court has consistently held that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952); see *Ker* v. *Illinois*, 119 U.S. 436 (1886). That proposition, known as the *Ker-Frisbie* doctrine, is directly applicable to this case. Regardless of whether the asserted violation is of an extradition treaty, a federal statute, or the Constitution, immunity from prosecution is not to be implied as a remedy for an illegal arrest, whether the arrest occurs in this country or abroad. The court of appeals' holding

that a violation of the extradition treaty with Mexico allows respondent to defeat his prosecution cannot be reconciled with that doctrine.

1. *A Forcible Abduction Does Not Give the Defendant a Right to Avoid Trial*

Frederick M. Ker, the defendant in *Ker* v. *Illinois*, was convicted in Illinois state court on larceny and embezzlement charges after being apprehended in Peru. Ker alleged that the President of the United States had dispatched an agent with a warrant requesting Ker's extradition pursuant to an extradition treaty between the United States and Peru. According to Ker's allegations, the agent never contacted the Peruvian government or presented the extradition warrant. Instead, he forcibly kidnapped Ker in Peru and brought him to the United States. Ker claimed that, because of his forcible abduction, his trial violated due process as well as the extradition treaty between the United States and Peru. 119 U.S. at 438-439, 441. This Court rejected those contentions, holding that neither the Due Process Clause nor the extradition treaty gave Ker the right to avoid trial. *Id.* at 440-444.

Ker claimed that he had a "positive right" not to be "forcibly removed from Peru to the State of Illinois" except "in accordance with the provisions of the [extradition] treaty." 119 U.S. at 441. The Court, however, held that the treaty created no such right. To the contrary, the treaty had no application at all, because it was not "called into operation, was not relied upon, [and] was not made the pretext of arrest." *Id.* at 443. Accordingly, Ker was "clothed with no rights which a proceeding under the treaty could have given him." *Ibid.* The Court concluded that "we do not see that the Constitution, or laws, or treaties, of the United States guarantee [Ker] any protection" against having to stand trial after "his forcible seizure in another country, and transfer by violence, force, or fraud, to this country." *Id.* at 444.

In cases concerning state criminal trials following abductions from another State, this Court has repeatedly described the principle of *Ker* in broad terms. For example, in *Pettibone* v. *Nichols*, 203 U.S. 192, 208 (1906), the Court stated: "The principle upon which the judgment [in *Ker*] rested was that, when a criminal is brought or is in fact within the jurisdiction and custody of a State, charged with a crime against its laws, the State may, so far as the Constitution and laws of the United States are concerned, proceed against him for that crime, and need not inquire as to the particular methods employed to bring him into the State." The Court specifically rejected the contention that *Ker* is inapplicable when the defendant's apprehension is accomplished by government action, rather than by the acts of private persons. *Id.* at 215-216. Similarly, in *Cook* v. *Hart*, 146 U.S. 183, 192 (1892), the Court indicated that *Ker* and its progeny establish that "this [C]ourt will not interfere to relieve persons who have been arrested and taken by violence from the territory of one State to that of another, where they are held under process legally issued from the courts of the latter State." The Court summarized the controlling doctrine in *Lascelles* v. *Georgia*, 148 U.S. 537, 543 (1893), stating:

> [I]t is settled by the decisions of this [C]ourt that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties or laws of the United States which exempts an offender, brought before the courts of a State for an offence against its laws, from trial and punishment, even though brought from another State by unlawful violence, or by abuse of legal process.

These cases reveal the breadth of *Ker's* underlying principle: the forcible abduction of a defendant does not divest the court of jurisdiction or provide the defendant with immunity from trial, absent clear directions in a statute or treaty.

The rule in *Ker* was not a novel one; it accorded with the common law rule rejecting the argument that the arrest of a fugitive abroad vitiates the court's jurisdiction—a line of cases that *Ker* noted as being of the "highest respectability." 119 U.S. at 444; see also *Mahon* v. *Justice*, 127 U.S. 700, 708-712 (1888). For example, in *State* v. *Brewster*, 7 Vt. 118 (1835), the defendant asserted that he was forcibly removed from Canada and that the court should therefore release him. The court rejected his contention—strikingly similar to respondent's claim—stating that once a fugitive was "retaken and brought in fact within our jurisdiction, it is not for us to inquire by what means, or in what precise manner, he may have been brought within the reach of justice." *Id.* at 121. Any protest by the foreign State, the court indicated, must be adjusted between the governments of the two countries. *Id.* at 121-122 ("The illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complain, it is a matter which concerns the political relations of the two countries, and in that aspect, is a subject not within the constitutional powers of this court.").[8] Nineteenth century precedents from England reflect the same view.[9]

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[8] The Court in *Ker* also cited *The Ship Richmond* v. *United States*, 13 U.S. (9 Cranch) 102, 104 (1815), in which the Court ruled that the seizure of a vessel from another country's jurisdiction, in violation of that country's rights, did not bar United States courts from conducting condemnation proceedings, and *State* v. *Ross*, 21 Iowa 467, 472 (1866), in which the court upheld a prosecution following an interstate abduction, stating: "That our own laws have been violated is sufficiently shown by the indictment. For this the State had a right to detain the prisoners, and it is of no importance how or where their capture was effected." See 119 U.S. at 444.

[9] See *Ex parte Scott*, 9 B. & C. 446, 448 (1829) (upholding prosecution following apprehension of defendant by an English police officer in Brussels; the court "cannot inquire into" the "circumstances under which [the defendant] was brought" before the court); *R.* v. *Lopez and Sattler*, 1 Dearsly & Bell's Crown Cases 525, 546-547 (1858) (upholding prosecution for murder committed after an ap-

In *Frisbie* v. *Collins*, *supra*, the Court reaffirmed that principle. Collins alleged that he was abducted from Chicago, Illinois, by Michigan law enforcement officers and forcibly returned to Michigan. He claimed that his trial and conviction violated his rights under the Due Process Clause and the Federal Kidnapping Act, 18 U.S.C. 1201 (1952). 342 U.S. at 519-520. The Court dismissed the due process claim on the basis of *Ker*, noting that the Court has "never departed" from the rule that the forcible abduction of a defendant does not divest a court of jurisdiction to try the defendant on criminal charges. *Id.* at 522. The Court also held that, even if the abduction violated the Federal Kidnapping Act, nothing in that statute suggests that its violation would give rise to a sanction "barring a state from prosecuting persons wrongfully brought to it by its officers." *Id.* at 523.

The applicability of the *Ker-Frisbie* doctrine does not depend on whether a foreign government objects to the seizure of the defendant, or whether the kidnapping is sponsored by the government or a private party. *Ker* announced a general rule of decision for domestic courts, and made no reference to whether the foreign government had objected to the defendant's removal. Subsequent decisions, such as *Frisbie* v. *Collins*, have made it clear that the *Ker* doctrine applies regardless of whether the abduction is attributable to government officials or private parties.[10]

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prehension abroad; jurisdiction over defendant was not affected "whether the capture * * * and the subsequent detention were lawful or unlawful").

[10] In *Ker*, the abduction was effected by an agent who was sent to Peru bearing the President's extradition request and instructed to return with Ker. Under contemporary jurisprudence, the government likely would be held accountable for that conduct. The Court made only fleeting reference to that issue, stating that the abduction was "without any pretence of authority under the treaty or from the government of the United States." 119 U.S. at 443. In any event, the decision in *Frisbie* establishes that the wrongful appre-

This Court has repeatedly held that the *Ker-Frisbie* rule applies to arrests that violate the Constitution; regardless of the unlawfulness of the defendant's apprehension, courts may not seek to remedy the violation by precluding the defendant's prosecution. See *New York* v. *Harris*, 110 S. Ct. 1640, 1643 (1990) ("There could be no valid claim here that Harris was immune from prosecution because his person was the fruit of an illegal arrest."); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."); *United States* v. *Crews*, 445 U.S. 463, 474 (1980) ("Respondent is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt."); *Stone* v. *Powell*, 428 U.S. 465, 485 (1976) ("judicial proceedings need not abate when the defendant's person is unconstitutionally seized"); *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975) (pretrial detention in violation of the Fourth Amendment cannot justify immunity from prosecution for the prisoner).[11]

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hension of the defendant by government officials is no more a basis for avoiding a criminal trial than the wrongful apprehension by private parties. See also *Pettibone* v. *Nichols*, 203 U.S. at 215 (rejecting the claim that *Ker* is inapplicable when the State "secured the presence of [the defendant] within its limits through a conspiracy on the part of its Governor and other officers").

[11] Although this Court has never departed from the *Ker-Frisbie* rule, the Second Circuit in *United States* v. *Toscanino*, 500 F.2d 267 (1974), stated that the Due Process Clause would bar a district court from assuming jurisdiction over a criminal case if the extreme torture, brutality, and kidnapping alleged in that case were established. The "*Toscanino* exception" to the *Ker-Frisbie* doctrine has never been accepted by this Court. It has been limited in the Second Circuit to cases of "shocking" and "egregious" conduct, see *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 65-66, cert. denied, 421 U.S. 1001 (1975); *United States* v. *Lira*, 515 F.2d 68, 71, cert. de-

Those cases reflect a recognition that immunizing a defendant from all prosecution is too high a price to pay for an illegal arrest. The *Ker-Frisbie* doctrine and its rationale are fully applicable in this case.

2. *The Exception to the Ker-Frisbie Doctrine Extends Only to the Enforcement of Express Treaty or Statutory Provisions*

The court of appeals believed that, notwithstanding the *Ker-Frisbie* rule, it was authorized to imply the remedy of repatriation based on the claim made here of a treaty violation. See *Verdugo*, 939 F.2d at 1345-1348. That belief was unfounded. This Court has recognized an exception to the *Ker-Frisbie* doctrine only when the Court has found both a clear violation of a treaty or statute and a clear intention in the treaty or statute to provide for termination of the prosecution as a remedy. The decisions of this Court applying that exception to the *Ker-Frisbie* doctrine demonstrate that the exception is a narrow one and that respondent's case does not fall within it.

In *United States* v. *Rauscher*, 119 U.S. 407, 419-424 (1886), the Court held that a defendant who is formally extradited pursuant to a treaty request may not be prosecuted for an offense other than the one that formed the basis for his extradition. *Rauscher* was decided on the same day as *Ker*, and both decisions were authored by Justice Miller. Unlike *Ker*, *Rauscher* involved formal

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nied, 423 U.S. 847 (1975); and it has been rejected or questioned by other courts, see, *e.g.*, *Matta-Ballesteros* v. *Henman*, 896 F.2d 255, 262-263 (7th Cir.), cert. denied, 111 S. Ct. 209 (1990); *United States* v. *Darby*, 744 F.2d 1508, 1531 (11th Cir. 1984), cert. denied, 471 U.S. 1100 (1985); *United States* v. *Herrera*, 504 F.2d 859 (5th Cir. 1974). In any event, the district court rejected respondent's *Toscanino* claim, and the court of appeals' holding was not premised on the Due Process Clause. The question of the validity of the "*Toscanino* exception" to the *Ker-Frisbie* rule is therefore not before this Court.

extradition proceedings.[12] The rule underlying the Court's holding, which has come to be known as the principle of specialty, see *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 523 (1988), was applied in light of specific terms in the Webster-Ashburton Treaty that required the presentation of evidence on the particular crime for which extradition was sought. The decision was also informed by the consistent prior practice of nations, which prohibited the prosecution of an extraditee on charges other than those that were made the subject of the extradition request. *Rauscher*, 119 U.S. at 419-424. Finally, the Court stated that "[i]f there should remain any doubt upon this construction of the treaty itself, the language of two acts of Congress * * * must set this question at rest." *Id.* at 423. The Court construed those statutes to provide that a defendant "shall not be * * * tried for any other offence than that with which he was charged in [the extradition] proceedings." *Id.* at 424.[13]

Nothing in *Rauscher* supports the conclusion that if the defendant's presence was obtained by means other than extradition, a court may invoke the treaty to refuse to try

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[12] The defendant was extradited from England under the Webster-Ashburton Treaty, Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, on charges of murder on the high seas; he was convicted, however, of inflicting cruel and unusual punishment, which was not an offense covered by the treaty. 119 U.S. at 409, 432.

[13] The Court cited Rev. Stat. § 5272, which authorized the Secretary of State to deliver a person who has been extradited "to be tried for the crime of which such person shall be so accused," and Rev. Stat. § 5275, which authorized the President to provide protection to a person extradited to this country "until the final conclusion of his trial for the crimes or offences specified in the warrant of extradition." 119 U.S. at 423. Justice Gray concurred in *Rauscher* based solely on the fact that by enacting Rev. Stat. § 5275 "the political department of the government has clearly manifested its will, in the form of an express law * * * that the accused shall be tried only for the crime specified in the warrant of extradition." 119 U.S. at 433.

the defendant at all.[14] *Rauscher* requires only that a defendant's trial conform to the charges for which he was extradited, and its rule is limited to persons tried after a rendition pursuant to the treaty. In *Ker*, the Court explained that the holding of *Rauscher* did not help Ker because he (unlike Rauscher) was not delivered under the terms of an extradition treaty. 119 U.S. at 443. The line between *Rauscher* and *Ker* is clear, and respondent's case falls on the *Ker* side of the divide: respondent was not extradited under a treaty and therefore is "clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to [a foreign nation] or to him under the treaty." *Ker*, 119 U.S. at 443.

The court of appeals also relied on this Court's decisions in *Ford* v. *United States*, 273 U.S. 593 (1927), and *Cook* v. *United States*, 288 U.S. 102 (1933). Those cases, however, both concerned the Convention To Prevent Smuggling, Jan. 23, 1924, between the United States and Great Britain, 43 Stat. 1761, and the Court's analysis turned on the specific—and unusual—terms of that treaty. The 1924 treaty established explicit limitations on the right of the United States to seize a vessel and institute judicial proceedings to enforce the liquor smuggling laws. *Ford*, 273 U.S. at 608; *Cook*, 288 U.S. at 111.[15] In light

[14] None of the factors noted by *Rauscher* apply in this case. There is no language in our extradition treaty with Mexico that supports extension of the treaty's obligations to non-extradition settings. Moreover, *Rauscher* emphasized that its construction of extradition treaties "did not intend to depart * * * from the recognized public law which had prevailed in the absence of treaties." 119 U.S. at 420. The court of appeals' rule, by contrast, would sharply depart from the recognized principle that the right to try a defendant is not impaired by his forcible abduction. And, unlike in *Rauscher*, there is no federal statute authorizing a district court to refuse to hold a trial if it concludes that the defendant was forcibly apprehended abroad.

[15] The Convention was concluded during the Prohibition era in order to resolve a conflict between the United States and Great

of those terms, the Court construed the treaty to forbid "adjudication" by United States courts when jurisdiction was premised on a seizure that violated the treaty. The Court explained that the Convention specifically established "the conditions under which a 'vessel may be seized and taken into a port of the United States * * * *for adjudication* in accordance with' the applicable laws." 288 U.S. at 121 (quoting Convention, Art. II(2), 43 Stat. 1762 (emphasis added)); see also *Ford*, 273 U.S. at 606.

Ford and *Cook* stand for the proposition that when a treaty puts express limits on the adjudicative power of the courts, a defendant may assert the right not to be prosecuted if he is taken into custody in derogation of the treaty's provisions. *Ford*, 273 U.S. at 606; *Cook*, 288 U.S. at 121-122. But *Ford* and *Cook* do not suggest that *Ker* is inapplicable when the treaty at issue does not specifically limit the government's authority to prosecute the defendant.[16] Indeed, the Court in *Ford* indicated that a treaty could not affect the government's ability to bring criminal proceedings "unless the treaty affirmatively confers * * * immunity from prosecution." 273 U.S. at 611. As we discuss in detail below, nothing in our extradition treaty with Mexico "affirmatively" indicates that a defendant who has been forcibly abducted from that country is immune from prosecution in an American court. Yet if re-

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Britain over the seizure, outside of our territorial waters, of British vessels suspected of smuggling liquor. *Cook*, 288 U.S. at 112. In *Ford*, the Court indicated that *Ker* did not bar a claim raised under that treaty, but that the defendants had waived the point. In *Cook*, the Coast Guard seized the British flag vessel Mazel Tov at a point more than one hour's travel time from the coast of Massachusetts, in violation of the treaty, and the Court upheld the objection made to the ensuing judicial proceedings.

[16] Unlike extradition treaties, the treaty at issue in *Cook* and *Ford* was specifically intended to "deal completely with the subject of [extraterritorial] search and seizure," 288 U.S. at 112, and to "fix the conditions" for "adjudication" in this country following such a seizure, *id.* at 121.

spondent is repatriated to Mexico, he will acquire just such an immunity from prosecution.[17]

B. The Extradition Treaty With Mexico Does Not Prohibit Extraterritorial Arrests

Not only did the court of appeals err in finding that the *Ker-Frisbie* rule is inapplicable in respondent's case, it also erred in holding that the United States violated an implicit obligation in the extradition treaty with Mexico when United States officials sponsored respondent's abduction from Mexican territory. In fact, the extradition treaty does not address the subject of apprehensions made outside the extradition context, and the treaty cannot be construed to impose an obligation to refrain from such apprehensions.

Extradition treaties have a limited scope and function. Their purpose is to impose obligations on the contracting parties to surrender criminal fugitives. As this Court has noted, "[p]rior to these [extradition] treaties, and apart from them, * * * there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the gov-

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[17] Respondent is a Mexican national. Under Article 9(1) of the extradition treaty, the government of Mexico is under no obligation "to deliver up its own nationals," although it may do so if "in its discretion, it be deemed proper to do so." 31 U.S.T. 5065. Chapter I, Article 14 of the Mexican Law of International Extradition, however, provides that no Mexican national may be extradited to a foreign country except in exceptional cases in the discretion of the Executive. *Ley de Extradicion Internacional*, Capitulo I, Articulo 14, *published in Diario Oficial* (Dec. 29, 1975) ("Ningun mexicano podra ser entregado a un Estado extranjero sino en casos excepcionales a juicio del Ejecutivo."). To date, the government of Mexico has not extradited a single Mexican national under the terms of the extradition treaty pursuant to an extradition request by the United States. The United States has no reason to believe that, if respondent is repatriated to Mexico, the government of that country would return him to the United States under the treaty.

ernment whose action was invoked." *United States* v. *Rauscher*, 119 U.S. 407, 411-412 (1886); *Factor* v. *Laubenheimer*, 290 U.S. 276, 287 (1933) ("[P]rinciples of international law recognize no right to extradition apart from treaty."). Extradition treaties are therefore negotiated in order to provide the United States and its partners with a formal mechanism for acquiring custody of suspects located abroad. *United States ex rel. Donnelly* v. *Mulligan*, 74 F.2d 220, 222 (2d Cir. 1934); 1 *Restatement (Third) of the Foreign Relations Law of the United States* Pt. IV, subch. 7B, at 557 (1987); 1 L. Oppenheim, *International Law* § 328, at 404-405 (2d ed. 1912).[18]

Our treaty with Mexico was negotiated against that background. The present treaty, like its predecessors, formalizes the circumstances in which rendition by one nation is required in response to a request by the other.[19] There is no textual or historical basis for concluding that our extradition treaty with Mexico is intended to serve any other purpose. In particular, there is no evidence

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[18] As a matter of domestic law, extradition treaties are also necessary to give the government the authority to deliver persons to foreign countries for prosecution. *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936) ("There is no executive discretion to surrender [a person] to a foreign government, unless that discretion is granted by law. * * * It must be found that statute or treaty confers the power.").

[19] The negotiations leading to our nineteenth century extradition treaties with Mexico are recounted in 1 J. Moore, *Extradition and Interstate Rendition* § 81, at 95-97 (1891). The first treaty took effect in 1862, 12 Stat. 1199. Some of the issues that arose under that treaty are discussed in *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. at 13-16. A successor treaty was signed and ratified in 1899, 31 Stat. 1818, and supplemented by additional conventions in later years. The current treaty was signed on May 4, 1978, "as one of a series of modern extradition treaties being negotiated by the United States." *Message from the President Transmitting the Treaty of Extradition Between the United States of America and the United Mexican States*, Exec. M, 96th Cong., 1st Sess. (1979), and it entered into force on January 25, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656.

that the United States and Mexico intended to regulate forcible abductions by entering into the extradition treaty.

1. *The Text and Purpose of the Extradition Treaty Do Not Support the Court of Appeals' Construction*

a. There is no provision in our extradition treaty with Mexico that forbids the signatory nations from making extraterritorial arrests outside the context of extradition proceedings. The preamble to the treaty states that it was entered out of a "[d]esir[e] to cooperate more closely in the fight against crime, and, to this end, to mutually render better assistance in matters of extradition." 31 U.S.T. 5061. In keeping with its stated objective to "render * * * assistance," the treaty speaks exclusively to formal extraditions that are requested by a nation under the treaty. The treaty first establishes an "Obligation to Extradite" in art. I, 31 U.S.T. 5061, and then describes the substance and procedure governing extradition obligations. Arts. 2-9, 31 U.S.T. 5062-5065 (substance); arts. 10-16, 31 U.S.T. 5066-5071 (procedure). In each case in which the treaty places a restriction on the parties' obligations, the restriction applies only when extradition is "requested," "sought," or "granted." See, *e.g.*, art. 5, 31 U.S.T. 5063-5064 (barring extraditions for political and military crimes); art. 6, 31 U.S.T. 5064 (incorporating double jeopardy principles); art. 7, 31 U.S.T. 5064-5065 (incorporating statute of limitations protections); art. 8, 31 U.S.T. 5065 (limiting extradition for capital offenses); art. 9, 31 U.S.T. 5065 (limiting obligation to extradite nationals). Similarly, the treaty contains a rule of specialty whose protection is specifically limited to "[a] person extradited under the present Treaty." Art. 17(1), 31 U.S.T. 5071. Nothing in the treaty speaks to the consequences of an apprehension that is made without a request for extradition.

While acknowledging that the treaty does not by its terms address extraterritorial arrests, the court of appeals held that its language indicated an intention to fore-

close such arrests. In particular, the court relied on the fact that some provisions of the treaty place limitations on the obligation to extradite, and it concluded that those provisions "only make sense if they are understood as *requiring* each treaty signatory to comply with those procedures whenever it wishes to obtain jurisdiction over an individual who is located in another treaty nation." *Verdugo*, 939 F.2d at 1351. But extradition treaties make perfect sense as fulfilling the far narrower aim of formalizing the circumstances under which the treaty partners are obligated to deliver up suspects for prosecution, and thereby facilitating the apprehension of fugitives. Like many international agreements, extradition treaties can be invoked to assist transactions between nations, but they do not forbid nations from pursuing national aims by other means. The court of appeals' inference that extradition treaty procedures are necessarily exclusive of other means of arrest was therefore unjustified by anything in the treaty's text.

In construing the treaty to impose implied obligations, the court ignored the cardinal principle that courts are not free to rewrite the international agreements to which this Nation is party. "[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821). "[I]t is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty * * * when * * * there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Maximov* v. *United States*, 373 U.S. 49, 54 (1963); see *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134-135 (1989); *United States* v. *Stuart*, 489 U.S. 353, 371-373 (1989) (Scalia, J., concurring in the judgment). If the United States and Mexico had wished to address the issue of forcible abductions in the

extradition treaty, "it would have been very easy to have declared that purpose in unmistakable terms." *Rocca* v. *Thompson*, 223 U.S. 317, 332 (1912).

b. The court of appeals' analysis likewise finds no support in the general purposes served by extradition treaties. Relying on its belief that extradition treaties serve the purpose "of safeguarding the sovereignty of the signatory nations, as well as ensuring the fair treatment of individuals," the court of appeals proclaimed that extradition treaties "provide a comprehensive means of regulating the methods by which one nation may remove an individual from another nation for the purpose of subjecting him to criminal prosecution." *Verdugo*, 939 F.2d at 1350, 1355. From this, the court drew the inference that extradition treaties must be read to prohibit arrests outside a treaty's terms.

The court of appeals' conception of the general purposes of extradition treaties is incorrect. As leading authorities on extradition explain, extradition treaties are designed to facilitate the rendition of fugitives, without more.[20] Those treaties do not create territorial rights. Extradition treaties may be drafted on the assumption that, as a matter of international custom and principle,

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[20] For example, 1 J. Moore, *Extradition and Interstate Rendition* § 72, at 82 (1891), states that "[t]he objects of extradition treaties are: (1) To render the obligation to surrender certain; (2) to insure reciprocity; (3) to adapt the list of extraditable offences to the relative social and political conditions of the two countries; (4) to regulate procedure." Another authority notes that "the typical intentions of parties to extradition treaties had been described as being, firstly, the common interest of States in the punishment of offences which threaten the wellbeing of society and, secondly, the interest of the State into whose territory the criminal had come that he should not remain at large therein." Schwarzenberger, *The Problem of an International Criminal Law*, in 3 *Current Legal Problems* 272 (G. Keeton & G. Schwarzenberger ed. 1950). Those purposes give no indication that extradition treaties embody a comprehensive agreement between nations about when, if ever, an extraterritorial arrest can take place, and what remedies should follow if such an apprehension occurs.

each nation's territory is generally immune from intrusions by other nations' law enforcement personnel, but that is far different from viewing extradition treaties themselves as prohibiting such actions or creating an independent source of protection for territorial integrity.[21]

The argument that extradition treaties are intended to prescribe the mandatory and exclusive means for acquiring custody of fugitives is particularly ill-conceived in light of the common practice of nations voluntarily to deliver an individual to the United States for trial without a formal extradition request, and the uniform judicial view that such a consensual removal does not bar prosecution, even though extradition procedures were not followed.[22] There is no basis for viewing that settled prac-

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[21] The district court cited 1 M. Bassiouni, *International Extradition: United States Law and Practice*, ch. 5, § 2 at 194 (2d rev. ed. 1987), for the proposition that extradition treaties are "designed to protect the sovereignty and territorial integrity of states." Pet. App. 26a. In fact, Bassiouni was merely describing the conditions "[f]or abduction to be unlawful under [customary] international law"; elsewhere, his treatment of the history of extradition treaties supports the conventional view that extradition treaties were designed simply to facilitate renditions of fugitives. 1 M. Bassiouni, *supra*, ch. 1, § 2-3, at 10-24.

[22] See, *e.g.*, *United States* v. *Valot*, 625 F.2d 308, 310 (9th Cir. 1980) (deportation); *United States* v. *Cordero*, 668 F.2d 32, 37 (1st Cir. 1982) ("nothing in these [extradition] treaties suggests that the countries involved *must* follow the extradition procedures set out in the treaties when they return criminal defendants to the United States"; rendition by deportation); *Stevenson* v. *United States*, 381 F.2d 142, 143-144 (9th Cir. 1967) (informal rendition by Mexican police); *Ex parte Campbell*, 1 F. Supp. 899 (S.D. Tex. 1932) (alleged joint kidnapping of defendant in Mexico by Mexican and United States officials). International precedents also establish that a nation may surrender a fugitive without complying with the requirements of an extradition treaty. See *Afouneh* v. *Attorney-General*, 4 Ann. Dig. 327, 327-328 (Palestine S. Ct. 1942) ("Where a fugitive is brought back by kidnapping, or by other irregular means, and not under an extradition treaty, he cannot, although an extradition treaty exists between the two countries, set up in answer to the indictment the unlawful manner

tice as a "waiver" of treaty rights; rather, the practice of cooperative renditions through non-treaty means reveals the limited scope of extradition treaties: they address only the narrow issue of extradition procedures and the obligations of a signatory when the treaty is invoked.

c. Finally, the argument that extradition treaties are intended to govern the apprehension of fugitives both within and outside the context of formal extradition proceedings is at odds with the Court's construction of the extradition treaty at issue in *Ker* v. *Illinois*, *supra*. The Court rejected Ker's claim that his forcible abduction violated the obligations imposed by the extradition treaty with Peru, holding that nothing in the treaty guarantees asylum for fugitives in other countries. 119 U.S. at 442. To the contrary, the Court explained, "[t]he treaty, so far as it regulates the right of asylum at all, is intended to limit this right." *Ibid.* Under *Ker*, if an extradition treaty has not been "called into operation," "relied upon," or "made the pretext of arrest," the defendant's apprehension does not violate the treaty. *Id.* at 443.

That principle has become a basic premise underlying the negotiation, drafting, and interpretation of extradition treaties generally. It is telling that, although the United States is party to more than 100 extradition treaties, some of which are more than a century old, no decision has previously held that an extradition treaty prohibits arrests made outside the treaty terms.

2. *The Historical Background of the Extradition Treaty Does Not Support the Court of Appeals' Construction*

The history of relations between the United States and Mexico lends no support to the view that the treaty part-

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in which he was brought within the jurisdiction of the court."); *In re Károly R.*, 4 Ann. Dig. 345, 345-346 (Hungarian Minister of Justice 1928) ("There is no rule of public international law according to which courts of a State have no right to conduct criminal proceedings against an accused who returned from abroad by any means other than extradition.").

ners contemplated that the extradition treaty would bar the apprehension and prosecution of fugitives by any means other than through recourse to the treaty. Indeed, quite the contrary is the case. As early as 1906, the United States informed the government of Mexico that it did not regard the forcible abduction of a defendant from Mexico as a ground for the defendant to avoid a criminal trial in this country, specifically relying on *Ker* v. *Illinois*, *supra*.[23]

The courts took the same position. In *Ex parte Lopez*, 6 F. Supp. 342, 344 (S.D. Tex. 1934), the Mexican government sought to intervene in habeas corpus proceedings to contend that a person allegedly seized in Mexican territory should be returned to the custody of Mexico. Citing *Ker*, the court refused Mexico's request, explaining that

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[23] In 1905, Antonio Martinez was kidnapped from Mexico by Antonio Felix. On June 11, 1906, after the United States had granted Mexico's request for Felix's extradition, the Mexican chargé wrote to the Secretary of State to protest the fact that Martinez was undergoing a criminal trial in the United States. The chargé claimed that since the apprehension of Martinez was "in contravention of the lawful procedure established by the treaty between Mexico and the United States for the extradition of any fugitive from justice, * * * [Mexico] considers it self-evident that the action pending against the man can not rest [on] any legal foundation." Letter of Balbino Davalos to Secretary of State *reprinted in Papers Relating to the Foreign Relations of the United States*, H.R. Doc. No. 1, 59th Cong., 2d Sess., Pt. 2, at 1121 (1909). On June 22, 1906, Acting Secretary of State Robert Bacon rejected Mexico's request and informed Mexico that Martinez's trial could proceed. Bacon stated that "[t]he exact question presented in this case appears to have arisen in a case which came before the Supreme Court of the United States in 1886 (Illinois *v.* Ker) [*sic*]." Letter of Robert Bacon to Mexican Chargé, *reprinted in Papers Relating to the Foreign Relations of the United States*, H.R. Doc. No. 1, 59th Cong., 2d Sess., Pt. 2, at 1121-1122 (1909). After describing the facts and holding of *Ker*, Bacon concluded that "[i]t is not seen wherein the case of Martinez differs from that of Ker," and that the United States government was "unable to comply with the request of the Mexican Government for the release of Martinez." *Id.* at 1122.

the defendant's forcible removal from Mexico did not entitle him to be released, and that Mexico's protest of the alleged violation of its sovereignty must be addressed to the Department of State, not the courts. See also *United States* v. *Sobell*, 142 F. Supp. 515, 523-525 (S.D.N.Y. 1956), 244 F.2d 520, 524-525 (2d Cir.), cert. denied, 355 U.S. 873 (1957).

"The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States* v. *Stuart*, 489 U.S. at 369. The historical record in cases involving extraterritorial abductions is contrary to the court of appeals' interpretation of the treaty. The evidence thus falls woefully short of the compelling showing that would be required to imply the existence of a treaty obligation that the drafters did not express. See *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 13, 17 (1936) (concluding that "[h]istorical background and administrative practice furnish no warrant for reading into the treaty with France a grant [of the power to extradite nationals] which the parties failed to insert"; "the question is not whether there had been a uniform practical construction denying the power, but whether the power had been so clearly recognized that the grant should be implied"),[24]

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[24] The sources cited by the court of appeals in *Verdugo* do not suggest otherwise. 939 F.2d at 1354. The court cited a letter written by Secretary of State James Blaine stating that the extradition treaty with Mexico "does not authorize either party, for any cause, to deviate from [its] forms or arbitrarily abduct from the territory of one party a person charged with crime, for trial within the jurisdiction of the other." *Ibid.*, quoting Letter to O.M. Roberts, Governor of Texas (May 3, 1881, *reprinted in Domestic Letters of the Department of State, 1784-1906* (National Archives Microfilm Publication M40, Roll 93). That letter, however, was written well before this Court's decision in *Ker*. Moreover, the letter was sent not to Mexico, but to a state governor urging him not to seize persons from Mexico for prosecution; it did not suggest that the treaty authorized a judicial remedy for

More generally, the *Ker* rule has been consistently followed in American courts and has been "widely applied throughout the world." *United States* v. *Cordero*, 668 F.2d 32, 36 (1st Cir. 1982).[25] In light of that record, it

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forcible abductions. The court also cited a letter written by Secetary of State George Shultz to the Florida Probation and Parole Commission to advocate early parole for a prisoner abducted from Canada by bounty hunters, an act that Canada viewed as a violation of the extradition treaty. 939 F.2d at 1354. Secretary Shulz's letter was premised on the view that the extradition treaty "could have been utilized to secure" the defendant's return, and that there was "no good reason" for failing to use it—not on the view that renditions or apprehensions without extradition are strictly barred by the terms of the treaty. *Contemporary Practice of the United States Relating to International Law*, 78 Am. J. Int'l L. 200, 208 (1984). Finally, the court misconstrued a statement made in congressional hearings by Abraham D. Sofaer, former State Department Legal Adviser. 939 F.2d at 1354. The statement specifically noted that under *Frisbie*, the nature of a seizure does not bar prosecution in this country; it indicated only that other nations (not, as the court of appeals implied, the United States) might view an extraterritorial seizure as "incompatible with any bilateral extradition treaty in force." *Hearing on S. 1373, S. 1429, and S. 1508 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 69 (1986).

[25] See, *e.g.*, *Ex parte Elliott*, 1 All E.R. 373, 376 (K.B. 1949) (alleged unlawful arrest by British officers in Belgium did not oust British court of jurisdiction to try the defendant); *Attorney General* v. *Eichmann*, 36 I.L.R. 277, 305 (S. Ct. Israel 1962) ("[E]ven if [an extradition] agreement existed between the two countries but the offender was not extradited to the first country in accordance therewith—the Court will not investigate the circumstances in which he was detained and brought into the area of jurisdiction."); Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 Am. J. Int'l L. 502, 505 n.15 (1935) ("In Germany, as in the United States, it appears that an individual cannot plead his illegal arrest as a bar to prosecution."); 1 M. Bassiouni, *supra*, ch. 5, § 2, at 191-194. The only cases of which we are aware that have refused to apply that doctrine are two decisions by lower French tribunals. See *In re Jolis*, 7 Ann. Dig. 191 (Tribunal Correctionel D'Avesnes 1933) (illegal arrest by French officials in Belgian territory could not support custody of the defendant);

is inconceivable that the President would have negotiated a treaty that overturns *Ker* and then submitted that treaty to Congress without any mention of the issue. Yet there is no evidence that the question was raised in negotiations leading to our extradition treaties with Mexico. Nor did the President's statement transmitting to Congress our most recent extradition treaty with Mexico refer to forcible abductions. *Message from the President Transmitting the Treaty of Extradition Between the United States of America and the United Mexican States*, Exec. M, 96th Cong., 1st Sess. (1979). Finally, the Executive Branch is firmly opposed to a reading of our extradition treaties that would allow a criminal defendant who was apprehended without an extradition request to claim that his arrest violated the treaty.[26] Against that background, the court of appeals erred in finding that our extradition treaty with Mexico embodies a rule prohibiting apprehensions that do not involve a treaty request at all.

Matter of Nollet, Journal du Droit Int'l 1188 (Cour d'appel de Douai 1891) (same). More recent French authority, however, has rejected the contention that an illegal abduction from abroad nullifies a prosecution in France. *Re Argoud*, 45 I.L.R. 90, 95-97 (Court of Cassation 1964) (extradition treaty applies only to a person for whom extradition was requested; assuming there was any violation of Germany's sovereignty in the abduction of the defendant from that country by unknown persons, "[t]he accused has no capacity to plead a contravention of the rules of public international law and could not claim to find in them a personal basis for immunity from judicial proceedings").

[26] In connection with this case, the Department of State's Legal Adviser expressed the Executive Branch's view that extradition treaties do not address the issue of forcible abductions and do not give rise to any remedies in such a case to be administered by courts. Gov't C.A. Addendum 68-72. "[A]lthough not conclusive, the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight." *United States* v. *Stuart*, 489 U.S. at 369, quoting *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982).

3. *Sources of International Law Do Not Support the Court of Appeals' Construction of the Extradition Treaty*

The court of appeals found support for its construction of the extradition treaty in sources of international law. The court relied, for example, on Article 2(4) of the United Nations Charter, June 26, 1945, 59 Stat. 1037, T.S. No. 993, which provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." In addition, the court relied on Article 20 of the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2420, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, which provides that "[t]he territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly on any grounds whatever." See *Verdugo*, 939 F.2d at 1352.

Far from supporting the court's analysis, those sources of international law confirm that the extradition treaty between the United States and Mexico does not address the issue of extraterritorial arrests. The international compacts on which the court relied make explicit the rights and duties of signatory nations. It is through those general treaties, not through the much more specialized device of extradition treaties, that nations express their recognition of each others' territorial integrity.

Moreover, it is well established that the international charters that deal with the use of force within the borders of other nations do not create rights enforceable by private individuals in court. Efforts to enforce provisions of the United Nations Charter and similar multilateral trea-

ties in federal courts have been repeatedly rebuffed.[27] And it has been settled since the early years of this Nation that even if a seizure within another nation's territory is deemed to violate customary international law, the violation does not give rise to enforceable rights in domestic judicial proceedings.[28] In light of the courts' re-

[27] The Constitution provides that "[t]his Constitution, and the Laws of the United States * * * and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Art. VI, Cl. 2. As a matter of domestic enforceability, however, it has long been recognized that treaties may be "executory" in the sense that they do not give rise to legal rights without implementing legislation. *See Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *Head Money Cases*, 112 U.S. 580, 598 (1884). Numerous decisions have rejected the proposition that general multilateral treaties like the United Nations Charter are "self-executing" sources of law in federal proceedings. *See, e.g., Committee of U.S. Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) ("Article 94 of the U.N. Charter [addressing the enforceability of judgments of the International Court of Justice] simply does not confer rights on private individuals."); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 373-374 & n.5 (7th Cir. 1985) (canvassing cases and finding that none concludes that the United Nations Charter is self-executing, while "quite a few decisions stat[e] that the Charter is not self-executing"); *United States* v. *Postal*, 589 F.2d 862, 873-884 (5th Cir.) (high seas treaty not self-executing), cert. denied, 444 U.S. 832 (1979); *Dreyfus* v. *Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), cert. denied, 429 U.S. 835 (1976); Pet. App. 38a-39a & n.24 (collecting cases indicating that United Nations Charter and the Charter of the Organization of American States "are not enforceable in federal courts absent implementing legislation").

[28] *See The Ship Richmond* v. *United States*, 13 U.S. (9 Cranch) 102, 104 (1815) ("The seizure of an American vessel within the territorial jurisdiction of a foreign power, is certainly an offence against that power, which must be adjusted between the two governments. This Court can take no cognizance of it; and the majority of the Court is of the opinion that the law does not connect that trespass, if it be one, with the subsequent seizure by the civil authority, under the process of the District Court, so as to annul the proceedings of that Court against the vessel"); *The*

fusal to enforce international norms that explicitly address the issue of territorial rights, it would be quite anomalous for courts to discover in extradition treaties an implicit prohibition of extraterritorial arrests that is judicially enforceable at the behest of a private individual.

C. Respondent Does Not Have Standing to Raise The Asserted Violation of the Extradition Treaty

Even assuming—contrary to the treaty's text, purpose, and historical background—that an extraterritorial arrest violates our extradition treaty with Mexico, an individual defendant has no right to raise such a treaty violation as a defense to criminal prosecution. The treaty, construed in light of familiar principles of interpretation, gives no such right. Moreover, to permit a defendant to object to an extraterritorial arrest in a criminal case would generate needless friction with the role of the Executive Branch to conduct foreign affairs.

1. *Absent a Clear Indication to the Contrary, Treaties Are Not Enforceable by Individuals*

The determination whether an individual may enforce a treaty in court must start from the premise that

> [a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. * * * It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Head Money Cases, 112 U.S. 580, 598 (1884). Although there are exceptions, "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." 2 *Restatement*, *supra*, at § 907

Merino, 22 U.S. (9 Wheat.) 391, 402-403 (1824); 1 *Restatement*, *supra*, § 433(2) and comment b, at 333-334.

comment a, at 395. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) ("These conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action.") (footnote omitted); *Dreyfus* v. *Von Finck*, 534 F.2d 24, 30 (2d Cir.) ("even where a treaty is self-executing, Federal jurisdiction * * * will not lie where it is not provided for in the treaty"), cert. denied, 429 U.S. 835 (1976).

There is nothing in the extradition treaty with Mexico that confers rights on a defendant in respondent's position. Nor would the implication of such rights have any sound basis.[29] Indeed, it would be particularly strange to imply a private right to avoid all criminal prosecution under an extradition treaty, because the treaty is designed, not to establish individual rights, but to articulate a framework for international cooperation in law enforcement.[30] As we have noted above, the *Ker-Frisbie* rule is a recognized feature of both domestic and international law, and the extradition treaty was negotiated in light of this country's consistent adherence to it. If a major departure from that rule is to be created, it should not be done without express language requiring that result.

The court of appeals accorded respondent standing to raise the alleged treaty violation on the ground that the government of Mexico has protested his abduction. Mexi-

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[29] If anything, courts should require a far more convincing showing before reading private rights into a treaty than into a statute. A treaty is primarily addressed to the rights of nations, and foreign governments are competent to protect their own interests.

[30] *Rauscher* is not to the contrary. Not only are the central factors that led the Court in *Rauscher* to imply a privately enforceable rule of specialty absent from this case, see note 14, *supra*, but the remedy of repatriation—which bars *all* prosecution in this country—is far more drastic than the remedy in *Rauscher*—which simply limits prosecution to the terms of the extradition grant.

co's protest, however, is irrelevant to the issue of respondent's standing. The treaty nowhere states that a protest by one nation entitles an individual to assert a treaty violation. To allow that result in this case would be highly incongruous, since it would make the jurisdiction of the federal courts turn on the diplomatic posture of a foreign nation at a particular time. In this case, for example, if Mexico were to withdraw its note of protest, the court of appeals' rationale requires that the district court would thereby regain jurisdiction over respondent and be entitled to try the case. *Verdugo*, 939 F.2d at 1361-1362.

It would be unprecedented to hold that a note addressed to the United States Department of State from the government of Mexico—or a letter addressed to a court from a Mexican consular official (see J.A. 67-71)—confers standing on a defendant to litigate a treaty violation in a United States court. Respondent is not empowered to speak on Mexico's behalf and is hardly a surrogate for that nation. Whatever rights Mexico has under the treaty cannot be delegated to a criminal defendant seeking to avoid trial in this country.

If Mexico believes that its interests require a protest over an arrest from within its territory, it can pursue the matter through diplomatic channels. That is the traditional remedy for a government to object to another country's apprehension of a fugitive from within its borders. See *United States* v. *Unverzagt*, 299 F. 1015, 1017 (W.D. Wash. 1924) (citizen of United States, allegedly abducted from Canada, had no right to resist trial; "if Canada or British Columbia desire to protest, the question undoubtedly is a political matter, which must be conducted through diplomatic channels. The defendant cannot before the court invoke the right of asylum in British Columbia."), aff'd *sub nom. Unverzagt* v. *Benn*, 5 F.2d 492 (9th Cir.), cert. denied, 269 U.S. 56 (1925); *Ex parte Lopez*, 6 F. Supp. at 344 ("The intervention of the government of Mexico raises serious questions, involv-

ing the claimed violation of its sovereignty, which may well be presented to the Executive Department of the United States, but of which this court has no jurisdiction."); *State* v. *Brewster*, 7 Vt. at 121-122. History is replete with examples of diplomatic resolutions of protests over extraterritorial arrests.[31] There is no reason to construe the extradition treaty in this case to sanction a wholesale departure from the normal mode of diplomatic procedure for resolving such disputes.

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[31] Perhaps the most famous case involved the apprehension of Adolf Eichmann from the territory of Argentina. Argentina lodged a complaint against Israel with the United Nations Security Council, which that body addressed on June 23, 1960, by declaring that the "violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations," and requesting "the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law." On August 3, 1960, the two countries issued a joint communiqué stating:

> The Governments of Argentina and Israel, animated by a desire to give effect to the resolution of the Security Council of June 23, 1960, in so far as the hope was expressed that the traditionally friendly relations between the two countries will be advanced, resolve to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina.

Attorney General v. *Eichmann*, 36 I.L.R. 5, 58-59 (Dist. Jerusalem 1961), aff'd, 36 I.L.R. 277, 305 (S. Ct. Israel 1962). See also *The Casablanca Case* (May 22, 1909) (France and Germany arbitrated whether French military officials had lawfully arrested military deserters who sought sanctuary in the custody of the German consul), *reprinted in Hague Court Reports* 110 (Scott ed. 1916); *The Savarkar Case* (Feb. 24, 1911) (France and Great Britain arbitrated whether France was entitled to the restitution of a British-Indian fugitive who had eluded British custody while on a ship docked in Marseilles and had been returned to British authorities by a French policeman), *reprinted in Hague Court Reports* 275 (Scott ed. 1916); 4 J. Moore, *A Digest of International Law* § 603, at 328-332 (collecting numerous examples), in H. Doc. 551, 56th Cong., 2d Sess. (1906).

2. *Permitting Respondent To Raise the Alleged Treaty Violation in Court Would Interfere with the Executive Branch's Authority over International Relations*

If respondent were to be granted standing based on Mexico's protest, it would raise many of the concerns that underlie the political question doctrine. The adjudication of claims challenging foreign arrests would frequently encroach on functions belonging exclusively to the political branches.

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to * * * Congress or * * * the Executive Branch." *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221, 230 (1986). The doctrine applies when there is "a textually demonstrable constitutional commitment of the issue to a coordinate" branch of government; when there is a "lack of judicially discoverable and manageable standards for resolving" the issue; or when the case requires "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). The danger of embroiling the judiciary in foreign affairs is a classic reason for applying the political question doctrine. See *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). In this case, three considerations underscore the political question concerns that would be raised by giving respondent a right to object to his trial based on Mexico's protest.

First, receiving and replying to communications from a foreign government is a task committed to the President, not the courts. The Constitution provides that the President "shall receive Ambassadors and other public Ministers." Const. Art. II, § 3. It is for the President to gauge the meaning and gravity of objections by foreign governments to this country's conduct abroad and to frame this country's response to those objections. *Ex parte Peru*, 318 U.S. 578, 586-587 (1943). In carrying

out that role, the President has means of acquiring information concerning the intentions of foreign powers that the courts manifestly lack. See *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936). Yet the court of appeals' rule makes it a threshold task for judges to receive and weigh diplomatic communications addressed to the Department of State. Courts are not equipped or empowered to carry on a diplomatic dialogue with other nations, or to interpret a diplomatic statement in isolation from the web of communications on a wide range of issues that characterizes the interaction between nations.

Second, the remedy of repatriation devised by the court of appeals cuts deeply into the government's authority to formulate this Nation's response to the claim of an unlawful apprehension. No provision of law grants to the courts the extraordinary power to repatriate a person. The court of appeals' assertion of that power is inconsistent with the generally limited function of the Article III branch in the realm of foreign relations. See *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). Nor does the role of the judiciary in administering extradition requests justify the invention of a court-made repatriation remedy in this context. Courts have never possessed the authority to surrender a person to a foreign land, even upon a determination that an extradition request is legally sufficient. The Secretary of State makes the final decision whether to extradite an individual and has the unreviewable discretion not to do so.[32] That provision underscores the point that the administration of extradition treaties is inter-

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[32] See 18 U.S.C. 3186 (authorizing, but not compelling, the Secretary of State to surrender a fugitive upon a judicial finding that the fugitive is extraditable); *Collier* v. *Vaccaro*, 51 F.2d 17, 20-21 (4th Cir. 1931); S. Spear, *Law of Extradition* 223-224 (1879). Other provisions of law vest the Attorney General with plenary authority to regulate the deportation or exclusion of aliens. See 8 U.S.C. 1101 *et seq.* The role of the courts in such matters is extremely limited. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

woven with the Executive's authority to conduct foreign relations in accordance with overall national interests. It would be anomalous to hold that, in the present context, courts have the unique and unreviewable right to remedy a perceived treaty violation by requiring repatriation.

Third, the determination of whether an extradition treaty violation should take precedence over the Nation's interest in enforcing our criminal laws is a policy judgment that is not for the courts to make. Cf. *The Chinese Exclusion Case*, 130 U.S. 581, 602 (1889) ("The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts."). The court of appeals' inflexible rule would restrict the government's law enforcement options in a particularly critical context. Under the court of appeals' approach, violators of United States law may acquire effective immunity from prosecution by seeking refuge in a nation that has signed an extradition treaty with the United States, but that is unable or unwilling to cooperate in bringing those persons to trial.[33] The court of appeals' ruling thus gives unwarranted sanctuary to foreign fugitives no matter how pressing the need to enforce our criminal laws. In the absence of a treaty provision requiring that result, it is wholly unjustified for the courts to compel it. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).

A decision to apprehend a foreign national abroad, without the consent of the nation involved, raises difficult

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[33] The United States has established a broad network of extradition treaties with other nations. But "[w]hile many nations have cooperated in our efforts to combat terrorism and narcotics trafficking by entering into extradition agreements and providing us with other forms of assistance, some foreign governments have unfortunately failed to take steps to protect the United States from these predations, and others actually act in complicity with these groups." *FBI Authority To Seize Suspects Abroad: Hearing Before Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 3 (1989) (testimony of Assistant Attorney Gen. William P. Barr).

policy issues with international ramifications. The need to weigh such policy considerations, however, underscores the unsuitability of those issues for judicial resolution. To read into extradition treaties implied rights and remedies and then license individual defendants to invoke those rights based on a foreign government's protest is an unsound use of judicial power. There is no provision of law that suggests that Congress envisioned that courts could free a defendant because the United States commissioned his extraterritorial arrest. By assuming the authority to reach that result, the court of appeals' decision improperly transfers to the judiciary policy judgments that belong to the political branches of government.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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